Application of German Law to Free Software/ Open Source licenses: The waivers of warranty and liability and their implications

NINA THERESIA DANICA BUCI

CANDIDATE NUMBER: 8001

SUPERVISOR: H TOMAS GOMEZ-AROSTEGUI

CONTENT

1. INTRODUCTION

In the last decade, Free/Open Source Software (FOSS) has gained public attention, not only because of its increasing market share of programs, but also because of its new approach to software licensing and community based development of programs.

In the digital age, computers are involved in nearly every part of life. Normal users will become more sophisticated and switch from relying on mainstream products to possibly lesser known but better functioning ones. A tendency to shift from proprietary to free software can already be seen in the attempts made by the European Union to support the use of such software[1].

In Germany parts of the public administration has considered switching or has already switched to FOSS systems[2]. The increasing popularity requires more attention to such licenses as it is necessary to provide legal certainty.

Whoever deals with Free Software is not exempt from legal attention. The licenses that come with FOSS have legal consequences just as every other license or contract does. The most popular license is the General Public License (GPL). So long as the GPL is not tested in court, however, the validity of the provisions of the GPL remains unclear. In fact, relying on the license and underestimating a negative outcome might result in a very expensive shock.

As of today, only one judgment on the GPL exists. The District Court Munich found a violation of the GPL[3]. It was celebrated as a breakthrough for FOSS licenses,

---

[1] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20060705+ITEMS+DOC+XML+V0//EN&language=EN#sdocta5 ; http://flosspols.org/

[2] http://www.bundestag.de/aktuell/presse/2005/pz_0509023.html

though the decision was based on an injunction and it is unclear if the parties involved will meet in front of the court again in the near future[4].

Most literature on this topic deals with the question of whether German Law applies to the GPL and constructs possible solutions how to adapt German Law to the GPL. The variety of different suggestions reflect the difficulties to in fitting the license into the German legal system. Surprising is the consensus regarding warranty and liability issues. Each scholar to have addressed the solution has concluded that German Law applies. They also agree that the waivers of warranty and liability provisions of the GPL are void. As a result, warranty and liability are simply revived by legal statute. Consequently, developers of this software may find themselves responsible for damages even though they relied on the validity of the provisions of the GPL that supposedly waive liability and warranties.

Developers will have to consider the fact that the legislation ignores the actual idea or philosophy behind the GPL and reinstalls the possible exposure to liability. Even worse, the licensor will be faced with unexpected consequences he was unable to influence or foresee.

It is interesting to observe how prior attempts to reconcile the GPL and German Law comprehensively discuss the philosophy of the GPL and its compatibility with German Copyright Law, only to then ignore the philosophy when trying to find an adequate compromise. As a consequence, these opinions lead to results different from the GPL's intention and they fail to discuss the consequences.

In all cases, the authors' range of conclusions with regards to waivers starts with no analysis at all and ends with "Especially the waivers of warranty and liability have to be considered as problematic"[5] Problematic for who actually? German courts will not have any difficulties in applying whatever they deem to fit and interpreting the

---

[3]Landgericht München I [LG] (trial court), 19.5.2004 - Az: 21 O 6123/04, http://www.jbb.de/urteil:lg_muenchen_gpl.pdf

[4] Interview with Harald Welte available at: http://www.golem.de/0406/31852.html

[5] Bartosz Sujecki, Vertrags- und urheberrechtliche Aspekte von Open Source Software im deutschen Recht, JurPC Web-Dok. 145/2005

licence accordingly. However, this will be problematic for all those using and relying on the validity of the GPL.

Considering the remarkable amount of users, including well-known companies[6], and the still growing interest in Free/Open Source Software, it is surprising that the validity of the waiver provisions of the GPL, §§11, 12 GPL, have not yet been tested in court. Most issues have been settled out of court. Other cases have dealt with the issue of whether the GPL had become part of the agreement or whether copyright had been breached. The lawsuit against IBM, for example, claims that IBM infringed copyright by distributing proprietary code belonging to SCO, the claimant. SCO was until today incapable of handing in any proof to support their claims and the outcome has still to be seen[7].

Additionally, the borderless character of the internet allows users from all over the world to participate. In the event of conflicts, diverse legal systems might be involved and lead to a multitude of differing outcomes. Prior to using the GPL as a license for a program, a developer would be required to inquire into innumerable laws in order to be aware of the possible legal consequences of using the GPL. The legal uncertainty is remarkable. It does not promote the use of FOSS if the possible complications are clouded.

The GPL is not practicable under German Law as long as the approach leads to warranty and liability to an extent not intended by the GPL. Even worse, considering the legislation of the European Union and the necessary implementation by the Member States, it is most likely that the GPL will have to face the same issues in all countries of the European Union.

In the light of globalisation and the internet, flexibility is necessary even if this might be out of line with the tradition of current German Copyright or Contract Law. The result should be in accordance with the philosophy behind the GPL;

---

[6] http://www.berlecon.de/studien/downloads/200207FLOSS_Activities.pdf

[7] Cf. Timeline of events re. IBM vs. SCO:
http://www.groklaw.net/staticpages/index.php?page=20031016162215566

otherwise, authors applying the GPL will have to be aware that it is not advisable to rely on the provisions of the GPL.

This thesis will present the German approaches regarding the waivers in §§ 11, 12 of the GPL and the implications for the use of the GPL as such. I will analyze those approaches in the light of the philosophy of FOSS and demonstrate that those approaches lead to different interpretations of the license's aims. Finally, I will suggest reasonable compromises in accordance with the aims of the GPL, of which I believe should be considered, especially when a German court would have to consider all those suggestions of the literature to reach an appropriate decision.

The starting point is GPL-licensed software, which is treated without commercial interests, i.e. without adding special services or additional guarantees in exchange for a fee.

The first part of this thesis covers the history of Free Software and the philosophy it is based on. In the second part basic principles of German Copyright Law, the most important provisions of the GPL and their classification in German Law are presented. The third part contains a comprehensive presentation of the solutions given to classify the GPL according to German Contract law. This will be followed by the presentation of warranty and liability applicable to the given circumstances. The next chapter discusses whether those suggestions lead to an appropriate solution and what would be advisable if they fail to do so. The thesis finishes with my Conclusions.

2. FREE SOFTWARE

The GPL is the result of developments in the software scene in the 1980s. It is important to understand the history and philosophy of Free Software and the GPL when applying German Law to it. Without knowledge of the background of the Free Software movement and the GPL in particular, it is impossible to interpret the GPL. Therefore, the following gives an overview of the history, development, and philosophy behind the GPL.

2.1. HISTORY AND DEVELOPMENT OF FREE/OPEN SOURCE SOFTWARE

In contrast to proprietary software, which usually solely provides the object code, it is possible for the user to receive the source code of free software to see and understand its functionality[8]. To analyse the source code opens up the possibility to modify and correct the software[9]. Economically the source code has the same importance as company secrets. To keep the monopoly over a certain solution provided by a program all that is necessary is to hide the source code and prevent others from working on it.

The concept of exchanging the source code is far from being new, as until the 1980s, the general practice in software development was to share and to cooperate. Computer scientists jointly solved problems and discussed new ideas. The source code was available even if software was commercially distributed. The reason behind this was that software did not constitute a market share but was rather

---

[8] Definition and explanation available at:
http://whatis.techtarget.com/definition/0,,sid9_gci539287,00.html

[9] Thies Deike, Open Source Software: IPR Fragen und Einordnung..., CR 2003, p. 9

delivered as part of the hardware, as the user wrote the necessary programs themselves or further developed the existing one[10].

When software started to be distributed separately from hardware a new market was created[11]. Increasingly, copyright notices and limitations replaced the availability of the source code. The open sharing and cooperating community developed into a closed, proprietary software system, which prohibited any attempts to gain deeper knowledge of the solution such programs offered.

The traditionalists critically observed the increasing use of proprietary software, which did not supply the source code, and did not contain the right holder's permission to change the purchased software.

Richard Stallman initiated the movement against the commercialisation of software in the 1980s. Several years later, some of its supporters separated from the Stallman's Free Software Foundation and created the Open Source Initiative. As there are slight differences between their philosophies, the overview will discuss them both separately.

2.1.1 FREE SOFTWARE

In 1984, Richard Stallman reacted to the increase of copyrighted software by founding the Free Software Foundation[12]. His intention was to create a UNIX[13]-compatible operating system, as UNIX was going proprietary at this time, which would be based entirely on freely and openly exchanged code[14]. Everybody would be able to access and work on the source code in order to let all users benefit from the modifications and improvements.

---

[10] Volker Grassmuck, Freie Software, p. 202 [hereinafter Grassmuck]

[11] Grassmuck, Freie Software, p. 215

[12] Cf. www.fsf.org

[13] Definition and explanation available at:
http://searchopensource.techtarget.com/sDefinition/0,,sid39_gci213253,00.html

[14] http://www.gnu.org/gnu/initial-announcement.html

He called the project GNU, a recursive acronym for GNU not UNIX, and invited all programmers to participate[15]. The process developed its own dynamics, based on developers sharing their knowledge and presenting problems to a large and increasing audience.

Around 1990 the GNU–system was nearly completed, just a Kernel[16] was missing. Linus Torvald who had developed the Linux-Kernel and made it available under the GPL solved this: in 1994 the operating system GNU/Linux 1.0 was released[17].

Linux represents the success of Free Software as the multitude of contributors support the progress and improvement of it. The more programmers are available to detect errors or share their ideas, the better and the faster such a system is developed and improved. The stability of Linux is the reason for its success and growing popularity.

To support his project, Richard Stallman and Eben Moglen developed the GPL, to give his idea the necessary legal protection and to secure the freedoms the FSF was campaigning for[18]. The GPL protects the philosophy of free software and prevents commercial adaptations of software. In return for the freedom offered, the user is obliged to release the modified versions of Free Software under the GPL, i.e. for unrestricted use, reproduction, distribution and modification.

2.1.2 OPEN SOURCE

Founded in 1998 the Open Source Software Initiative (OSI) aimed at replacing Stallman's term of Free Software with the commercially friendly version of "open source". Bruce Perens and Eric Raymond realized the economic potential of free

---

[15] www.gnu.org/gnu/initial-announcement.html

[16] Definition and explanation available at:
http://searchopensource.techtarget.com/sDefinition/0,290660,sid39_gci212439,00.html

[17] Cf. http://searchopensource.techtarget.com/sDefinition/0,290660,sid39_gci878891,00.html

[18] Cf. Preamble of the GPL

software, but also the danger the idealistic rebels of the FSF headed by Richard Stallman and his disputatious "hacker-ethic" posed for the acceptance of the business world. Especially to gain investors, the technological and economical advantages of free software were advertised, while the idealistic ideas of free software were placed in the background. The mistakable term "free" was replaced by "open source", to clarify that free did not express free of charge[19].

Coinciding with Netscape's announcement to disclose the source code of their popular browser, a result of the famous war between Netscape and Microsoft, it seemed appropriate to promote the idea of free software in the business world under a new term and with a modified licensing concept. Netscape and O'Reilly applied the term "Open Source" in their press releases, which set the cornerstone for the success "Open Source" was going to experience[20].

Already in 1998, several famous companies as for example IBM, Sun Microsystems and Oracle decided to enjoy the advantages offered by Open Source Software (OSS)[21].

To determine which licenses comply with the Open Source Definition, the OSI introduced a licensing process to certify applicable licenses as "OSI-certified"[22].

The whole development resulted in a rift between the FSF and OSI as the same idea they shared was split into moral and economic aspects. The FSF feared that the idealistic approach of freedom would be affected by the concept of OSS especially as it allowed derivative works to be made proprietary under certain circumstances[23].

The promotion tour was successful as the established term nowadays is Open Source Software, even when discussing the GPL, the license of the FSF, and, by the way, the most used copyleft license in the world.

---

[19] Cf. Eric Raymond: http://www.catb.org/~esr/open-source.html [hereinafter Raymond]

[20] Cf. http://www.opensource.org/docs/history.html

[21] Grassmuck, Freie Software, p. 230

[22] http://www.opensource.org/docs/certification_mark.php

[23] Cf. http://www.opensource.org

2.2 PHILOSOPHY

According to Stallman in the GNU Manifesto, he derived this philosophy as a necessity of Kant's categorical imperative: if he likes a program, he must share it with other people who like it[24]. The GNU Manifesto is the first document to describe the aims of the FSF. Richard Stallman wrote it when he announced the GNU project and invited everybody to contribute.

The intention of the FSF was to create "free" software. Free in the meaning of everybody should be free to copy, distribute, modify and distribute the modified software under the same conditions[25]. According to the Free Software Definition, it contains four freedoms:

- the freedom to run the program, for any purpose;
- the freedom to study the functionality of a program and adapt it if necessary for the intended purpose. This requires the source code to be available;
- the freedom to distribute the copies so that others can use it; and
- the freedom to improve the program and publish it so that the community can benefit from it. Here the source code is again a precondition[26].

The concept is obviously oriented towards developers and the pre-proprietary state of cooperation and exchange of knowledge. To preserve this way of working on software, the four freedoms were complemented with the prohibition of royalties. This does not prohibit any possibility to distribute those programs commercially; on the contrary, it is the intention of the FSF (which finances itself partly by doing so) that the income shall be replaced by ways of distribution or services around the software. Merely the rights of use on it shall be available free of charge[27].

---

[24] Richard Stallman, The GNU Manifesto, http://www.gnu.org/gnu/manifesto.html

[Better would be: If I don't want to be prevented from using a program I must not prevent others from it. In terms of use limitation by proprietary software}

[25] The author tried to avoid citing the famous term "free as in freedom, not free beer"..

[26] http://www.gnu.org/philosophy/free-sw.html

[27] http://www.gnu.org/philosophy/selling.html

It is also not contrary to the philosophy of the FSF to charge an incredibly high price for the distribution of software, as the marketplace will decide about the price and accordingly whether the distributor will be a success demanding those high prices[28].

Software should be a public good and not deprive the public from its use by proprietary limitations. Free exchange of information would lead to faster development and better software, hence to the benefit of everyone. Instead of the material incentive copyright offers, creativity itself and fame for their deeds to the public would be the rewards for the creative individual.

2.3 COPYLEFT

"To copyleft a program, we first state that it is copyrighted; then we add distribution terms, which are a legal instrument that gives everyone the rights to use, modify, and redistribute the program's code *or any program derived from it* but only if the distribution terms are unchanged. Thus, the code and the freedoms become legally inseparable." [29]

To protect this software freedom, the GPL uses copyright law. It requires the user to apply the GPL to modified or redistributed works in exchange for the granted rights; otherwise it will be a breach of copyright. This brilliant idea mirrors the intention of Richard Stallman to keep software free from proprietary limitations and of course, to prevent free code to be stolen and sold under proprietary licenses.

Copyleft is wordplay to emphasize the radical difference from copyright. As the aim of the FSF is to give all users the possibility to redistribute and change the software, Copyleft uses copyright tools to prevent the software to become proprietary[30].

---

[28] http://www.gnu.org/philosophy/selling.html "You can charge nothing, a penny, a dollar, or a billion dollars. It's up to you, and the marketplace, so don't complain to us if nobody wants to pay a billion dollars for a copy."

[29] FSF, What is Copyleft? http://www.gnu.org/licenses/licenses.html#WhatIsCopyleft

[30] http://www.gnu.org/licenses/licenses.html#WhatIsCopyleft

Instead of giving the software into the public domain, where it is possible to change it and distribute it as proprietary work, it uses the copyright licensing to secure this freedom for the lifetime of the software and its adaptations.

3. THE GPL

"Licenses are not contracts"[31]

Eben Moglen, the lawyer behind the GPL, considers the GPL as solely a license. Whether there exists confusion about this or not in the USA, the classification of a "license" is different in Germany. German Copyright Law does not know a "license". A so-called "license" is considered a transfer of certain (copy)rights based on a contract and will always be regulated by both, copyright and contract law - whether Eben Moglen likes it or not[32].

It becomes apparent that the differences between our legal systems might create different legal relationships in Germany and that these might lead to results other than those intended by the GPL. If for example, software is not protected by copyright, the aim of the GPL is lapsed anyway. This thought is not so absurd if one considers that before the EU Directive on Computer Programs, the protection for software was highly discussed in Germany.

The concept of Free Software, which trusts in the participation of several programmers, interested in sharing their experience and skills, can lead to a high number of editors and a question of authorship. Especially GNU/ Linux, which is the prototype of the decentralized method to work on a program, is a good example to clarify how incredibly high the number of participants can be.

It is a difficult task to determine the relationship between the multitudes of authors and to identify and sue every single one if they are situated in different countries of the world. Especially for liability issues this is a severe problem. The potential that responsible persons cannot be detected is remarkably high, especially as the

---

[31] Eben Moglen, Free Software Matters: Enforcing the GPL, I: ,
http://emoglen.law.columbia.edu/publications/lu-12.html

[32] a more detailed elaboration will follow further down

copyright notice does not stringently require the real name of an author but also leaves room for anonymity. The German Copyright Act stipulates in § 13 UrhG a choice to decide whether the author's name emanates from a work's label and what name shall be applied.

The GPL tries to avoid such issues by waiving any warranty and liability. Without those waivers, the relations between the authors are very important to be determined and maybe even impossible to be assessed.

However, what exactly does the GPL stipulate? This thesis focuses on the waivers of warranty and liability, but to discuss the validity and implications of those, the license itself has to be valid in Germany. The validity of the GPL in Germany has been approved by the decision of the District Court Munich but the legal peculiarities might still cause problems unknown to other legal systems.

This part of the thesis presents the most important provisions of the GPL and the respective issues that are relevant for the waivers. I will then examine the term "license" in the context of German Law and clarify why it is necessary to talk about German Copyright and Contract Law to analyse the waivers.

3.1 GNU GENERAL PUBLIC LICENSE

The freedoms and obligations the GPL grants and imposes reflect the philosophy of free software and the intention to protect this freedom[33]. Those freedoms are granted in terms of copyright and linked to obligations, which have to be abided. When looking at the license one will realize that the GPL is also partly self-explanatory, it tries to explain and to virtualize its content for better understanding.

[33] Cf. Preamble of the GPL

3.1.1 FREEDOMS AND OBLIGATIONS OF THE USER

§0 GPL[34] regulates the scope of the GPL, defines recurring terms, and excludes all activities other than copying, distributing, and modifying. It also emphasizes that the act of running a program is not restricted. Therefore, some argue that the GPL is not part of the agreement in cases when the software is just used without being modified or distributed.

The scope of software protection is regulated in §69c UrhG and includes the right to reproduction, adaptation, and processing, which is not allowed without consent of the copyright holder. Corresponding to the leading opinion of the literature, the term reproduction also includes the loading of a program into the RAM so that the plain use of a program without consent is already a breach of copyright[35].

Without the clarification in §0 GPL, the user would not become a lawful user in terms of § 69c UrhG and the simple use would be a breach of copyright. Considered from this perspective it seems that the GPL is also, according to German Copyright Law, necessary in order to simply use the software and nothing more[36].

Additionally, if the act of running does not require the GPL, the question whether the waivers are valid does not even occur, as they would not be part of the contract. The consequence of this is a general liability according to the legal statutes. When taking into account the philosophy of the GPL and the intention to waive any warranty and liability, because the program can be used free of charge, it must be contrary to the GPL to assume that the waivers should not apply to the act of running the software.

For the further analysis, I will assume that the act of running also must be covered by the GPL.

---

[34] Cf. §0 GPL

[35] Jochen Marly, Softwareueberlassungvertraege, mn. 131 et seq. [hereinafter Marly]

[36] Similar Till Jaeger and Axel Metzger, Open Source Software, p. 139 [hereinafter Jaeger/Metzger]

The rights to copy and distribute the original unaltered work are granted in § 1 GPL. According to § 31 II UrhG simple rights of use are granted to the licensee[37]. A simple right of use does not encompass the right to grant exploitation rights to others.

This right remains with the licensor, unless an exclusive right pursuant to § 31 III UrhG has been granted. This construction is in line with the intention of the GPL, as the contract will be concluded with the rightholder even though the work is received from other sources[38]. In exchange, the licensee has to abide the listed obligations: to attach a copyright notice, a copy of the license, and the disclaimer of warranty to the work.

The very important paragraph § 2 GPL contains the FSF's idea of "Copyleft" which requires that derivative works are likewise licensed under the GPL. The adaptation of the original licensed work is, as well as its distribution, allowed, if the derivative works refer to the changes and the author. The vital part is still the provision about derivative works, as this will keep the software free from proprietary rights for the duration of its lifetime.

§2 GPL allows the modification of a program as well as the reproduction and distribution of this modification. Apart from granting a right to modify, this also implies the consent of the original author to copy and distribute the adaptations in terms of §§ 3, 23 UrhG[39].

This represents the typical process for FOSS, when the software is developed over the network[40]. With regards of FOSS, the consent of a multitude of programmers must be obtained and as well be granted to all subsequent programmers.

---

[37] Frank A. Koch, Urheber- und kartellrechtliche Aspekte--, CR 2000, p.333; Jaeger/ Metzger, Open Source Software, p. 32, [hereinafter Koch]

[38] Cf. § 6 GPL

[39] Cf. 3.2.3 Adaptations

[40] Jaeger/ Metzger, Open Source Software, p. 28

The obligations of § 2 GPL will come into effect the moment the modified version is distributed. As long as the modification is done for private use, an action, which also requires the consent of the author accordant § 69c UrhG[41], is permitted without imposing the duties in § 2 a) – c) GPL.

3.1.2 BREACHES OF THE GPL

Actions infringing the GPL will lead, according to §4 GPL, to the automatic termination of the rights it grants[42]. At this point, the GPL uses copyright protection for the work. Without the license, any action is infringing copyright.

In Germany it has been discussed whether this construction is possible and what provisions to apply to reach an adequate result. Is it a contractual obligation, a right of use with limited content accordant to §31 I S. 2 UrhG, or a right of use with the condition to comply with the obligations of the licensee?

It seems obvious, that contractual obligations do not fit the intentions of the GPL, as §4 GPL speaks of the "automatic termination of rights". If all rights shall be terminated, the tying of a right of use to the obligations must be a link in rem. A contractual link would not lead to the intended result, as the rights would not be automatically terminated, but result in a claim to meet the obligations[43].

A right of use with limited content, §31 I S. 2 UrhG, grants a wider range of possibilities compared to the assumption of a contractual obligation, the licensor assert claims pursuant § 97 UrhG. The leading opinions in the literature and case law require such a restriction to be applied on divisible types of use. The GPL does not refer to different types of use; it refers to Free Software and all possible types of uses it contains[44]. Hence the assumption of a right of use with limited content is incorrect.

---

[41] Gerhard Schricker, Urheberrecht, § 69c mn. 23 [hereinafter Schricker]

[42] Cf. § 4 GPL

[43] Jaeger/ Metzger, Open Source Software and German Copyright, ICC 2001, p. 62

[44] Schricker, Urheberrecht, Vor §28 mn.52, 55; Jaeger/ Metzger, Open Source Software, p. 38

The assumption of a right of use with the condition to comply with the obligations posed by the GPL is correct and in tline with the GPL itself. § 158 BGB is applicable as the LG Munich recognized this construction was to be welcomed because it expresses the intention of §4 GPL[45].

3.1.3 §6 GPL - GRANTING OF RIGHTS

The process of licensing is outlined in § 6 GPL. The contract is concluded, whenever the program is distributed, with the original rightholder, even if the new licensee received the software from a third party[46]. The third distributing party acts as a messenger, not an agent, as it is undoubtedly stated that the distributor is not permitted to alter the license[47]. An exception to the above mentioned occurs concerning a joint work. If the distributor is author of the adaptation, he is logically a licensor of this work, jointly with the author of the original work.

The reason behind the prohibition to alter the license is that a license "chain", which would occur if the rightholder permits the licensee to grant a right of use to others, could lead to problems if the contract is not effective or a breach of the GPL is at hand. For example, if one person is not eligible to conclude a contract, this person cannot grant rights to others. At this point the further transfers of the software would not include the GPL and the granted rights[48].

3.1.4 §§11, 12 GPL – DISCLAIMERS OF WARRANTY AND LIABILITY

If a program is published under the GPL, but exclusive rights on it were in fact granted to someone else or the program destroys the computer and leads to damages

---

[45] http://www.jbb.de/judgment_dc_munich_gpl.pdf

[46] Jaeger/ Metzger, Open Source Software, p.47

[47] §6 GPL Sentence 2: "You may not impose further restrictions on the receipents' exercise of the rights granted herein."

[48] ifrOSS, Die GPL…, p. 105 mn. 4

due to a bug the editor should have recognized, the question arises as to who will be liable. For example, the possibility that the responsible persons for a defect cannot be detected is remarkably high, especially as the copyright notice does not stringently require the real name of an author but also leaves room for anonymity[49].

Therefore, the GPL aims to prevent the author from being liable for any damages. To avoid difficult assessments of the relations between the authors and the scope of liability, those provisions benefit developers and distributors by shifting the risk of damage to the user.[50].

Another argument is of course the fact that the author surrenders his possibility of an income for the rights on the work. In exchange for giving up this benefit, the author expects and trusts that he or she will not be held liable at some point for errors in the program or licensing chain.

The importance of the waivers can be recognized by the way they are emphasized within the GPL. Firstly, the preamble points out that the GPL intents to waive all warranty and liability in order to protect the authors[51]. §1 GPL also requires the disclaimer of warranty to be distributed with the program. To drive the point home, §§ 11, 12 of the GPL are written in capital letters.

Although the wording of the disclaimers explicitly expresses its intention, it is arguable whether they can be upheld under German Law.

---

[49] The German Copyright Act stipulates in § 13 UrhG a choice to decide whether the author emanates from a work's labelling and what name shall be applied.

[50] BECAUSE THE PROGRAM IS LICENSED FREE OF CHARGE,
THERE IS NO WARRANTY FOR THE PROGRAM…".

[51] Cf. Preamble of the GPL

3.2 "LICENSE"

Even though the GPL keeps using the term "license" and Eben Moglen insists that a license exists independent from contractual obligations, according to German Law a license is a contract; the term "license" never occurs in the German Copyright Act. Irrespective of the discussion of whether the GPL is a license or a contract in the USA, a license detached from a contract as an underlying transaction is unknown to the German concept of copyright.

The transfer of rights of use are regulated by §§31 et seq. UrhG which refers to contracts. Hence, exploitation rights are transferred based on a contractual obligation. Whether one likes to call it a "license contract" or a"contract on the transfer of rights of use" is irrelevant, as the principle of freedom of contract allows the parties to decide the content independent from State interference[52]. Most obviously, the contract will regulate the obligation to transfer the right of use in exchange for whatever the contracting parties negotiated.

In terms of the GPL, the license agreement requires the rights granted and the software transferred to be based on a contract. The contract constitutes the cause for the transfer of the rights to use and the "property" of the software. The principle of abstract rights in rem (Abstraktionsprinzip), anchored in German Civil Law, is the basis of this separation. A comprehensive explanation is not necessary though, as it is sufficient to know, that the transfer of property or intellectual property rights has to be based on a contract[53].

Since the German Copyright Act refers to contract law in case a right of use is transferred, it is necessary to determine the underlying type of contract. The type of contract also stipulates the scope of warranty and liability, which will be discussed below in Part 4.

---

[52] Nigel Foster and Satish Sule, German Legal System and Laws, p. 369 [hereinafter Foster/ Sule]

[53] For a short explanation please refer to: Foster/ Sule, German Legal System and Laws, p. 370 et seq.

4. VALIDITY OF §§ 11 AND 12 GPL

In the previous chapter, I explained that the transfer of a right of use has to be based on a contract. The determination of the type of contract is vital because it defines the scope of any warranty and liability. Depending on the type of contract, the validity of the waivers differs.

The reader surely wonders now, why the scope of warranty and liability has to be assessed, since the GPL waives all warranty and liability. The question is whether those waivers are valid and to what extent it is possible to waive completely any warranty and liability by contract. This shall be examined first. If those waivers turn out to be invalid, the statutory provisions stipulate the scope of warranty and liability and require the determination of the type of contract.

If German Law is not applicable and US law applies, the question about the waivers does not occur. A possibility to negotiate contracts that exclude all warranty and liability leads to the same situation. The aim of this chapter is to discover whether the waivers are valid under German Law.

To achieve this I will discuss the applicability of German Law and the boundaries of the principle of Freedom of Contract the German Civil Code contains. Subsequently the waivers will be tested by comparing them to provisions of standard business conditions.

4.1 APPLICABILITY OF GERMAN LAW

The GPL has been created based on American law. It is not out of scope to assume that the parties chose American law to be applied. Obviously, if American law were

applicable, the thesis would have reached its end at this point. Nevertheless, a short overview regarding the applicability of German Law shall follow.

Doubts whether German Law shall be applicable, can arise as the GPL is drafted in English and according to US law and licensing principles. The GPL is rooted in a different system of Copyright and Contract law, especially as waivers of copyright are inadmissible in Germany and a waiver of warranty and liability is not dealt with accordingly[54]. The acceptance of the GPL could be considered as an implied choice of American law[55]. On the other hand, when taking the term "unless by applicable law required" which occurs in both §§11 and 12GPL, the assumption of a compulsory choice of US law is not justified[56].

Firstly, it bears noting that Copyright issues are, according to the international treaties, i.e. Berne Convention, treated according to the country of origin principle. Hence, all copyright related claims have to be submitted in the country where the interference occurred. I previously elaborated, though, that a license is the transfer of rights based on a contract. Thus, this differentiation requires the legal transaction to be considered as a contractual obligation and leads to a number of disputed issues regarding the applicable law. One example is the assumption of a civil partnership for authors of compound works, an issue that has not yet been satisfactorily solved by international company law[57].

It is obvious now that the contribution to FOSS over the internet involves several authors and adds an international element, which can lead to the laws of several nations being applicable. The list of possible conflicts of laws is long, but outside the scope of this paper, as the core of this thesis is German Law. Naturally, to discuss the application of German Law to the waivers, it has to be assumed that German Law is applicable.

---

[54] Spindler, Rechtsfragen bei Open Source, p. 89 rn. 137

[55] Jaeger/ Metzger, GRUR Int. 1999, p. 842; Deike, CR 2003, p. 11

[56] Deike, CR 2003, p. 11

[57] Spindler, Open Source: Legal Problems in Germany, www.opensourcelaw.info

One remark shall be made though concerning consumers. It can be assumed that German Law applies, at least insofar as the consumer must not be deprived from the protections granted within the EU[58]. This is anchored in Article 29 EGBGB. Without a lengthy examination of the content and prerequisites, it is sufficient to say that the download of FOSS leads to the application of German Law in case a consumer contract exists[59].

4.2 FREEDOM OF CONTRACT (VERTRAGSFREIHEIT)

The German Civil Code is based on the presumption that the state should not interfere with the choice and rights of the individual. This generally means that the parties are free to negotiate contract clauses. Rooted in Article 2 I Grundgesetz, which is concerned with the free development of personality, this idea is supported by the highest legislative instrument of the Federal Republic of Germany. However, this freedom is subject to limitations by the general provisions of the German Civil Code and the Basic Constitutional Law[60]. The autonomy of the parties will prevail, as long an equality of bargaining power exists. Is this is not the case, then the law will engage and protect the weaker party[61]. An example of such protection is the General Business Conditions Act, which was been implemented into the Civil Code when the law of obligations was reformed in 2002.

Therefore, it is possible to negotiate contractual obligations similar to the §§ 11, 12 GPL. This means that the warranty and liability could be waived by contract. The scope of divergent contractual agreements, i.e. the waivers §§ 11, 12 GPL, is stipulated in § 276 BGB. That section encompasses fault-based behaviour, i.e. intentional conduct and negligence[62], and allows the decrease or increase of liability

---

[58] Spindler, Rechtsfragen bei Open Source, p. 95

[59] Deike, CR 2003, p 12

[60] Buergerliches Gesetzbuch und Grundgesetz

[61] Foster/ Sule, German Legal System and Laws, p. 369 et seq.

[62] Cf. § 276 I BGB

of the parties. This is limited however by § 276 III BGB which prohibits a waiver of liability for intentional conduct in advance.

As the GPL seeks to waive any warranty or liability, which is, as said above, impossible regarding intentional conduct, a mitigation of liability according 276 I BGB should be assumed. The mitigation is again limited by legal statutes depending on the type of contract and situation. The question of whether a mitigation of liability can be assumed shall be left for the discussion of the types of contracts, which could be applied as underlying transaction.

Even though the German Civil Code knows the concept of freedom of contract, the freedom does not allow a complete waiver of any warranty and liability. Independent from the possible mitigation mentioned in § 276 I BGB the waivers of §§ 11, 12 GPL cannot encompass intentional conduct when German Law is applied.

4.3 Standard Business Conditions (AGBs)

It has been mentioned in the beginning, that the waivers of warranty and liability might be void under German Law. To determine this, it is necessary to examine whether the GPL has become part of the contract. The discussion will be held detached from a particular type of contract, as the determination of the type of contract is not required. Starndard Business Conditions (AGBs) apply to all types of contracts.

To fulfil the requirements for AGBs the GPL has to constitute pre-formulated, non-negotiable contract terms. Additionally, it must be included to the contract and the result of the term control must be positive.

In case the term control reveals that the waivers §§ 11, 12 GPL are void, then statutory law must be applied. Depending on the type of contract, the statutory provisions stipulate differing scopes of liability. For that reason, the examination of the suggested types of contracts and the implications for the waivers follows in the next chapter.

The GPL itself is protected by copyright to prevent it from being altered[63]. This makes it impossible for a user to negotiate the content of the contractual terms; therefore, the GPL doubtless constitutes pre-formulated contract terms.

4.3.1 GPL, PART OF THE CONTRACT?

According to §5 GPL, the GPL will be automatically accepted by the user at the latest, when the software is modified or distributed. It has been explained in the previous chapter, that the simple use of software will require the grant of a right of use as well. For this reason the GPL must be accepted before using the software.

The conclusion of a contract requires an offer and an acceptance from the contracting parties. §5 GPL refers only to the acceptance of the GPL, thus it can be assumed that an offer to treat directed at everyone applies, with the aim being the conclusion of a license contract. Subject matter is the granting of rights of use under the conditions listed in the license[64]. The modification or distribution of the software constitutes an implied declaration of intent and leads to the acceptance of the GPL pursuant § 5 GPL.

The offeror has to receive the acceptance. This is regularly not the case regarding the GPL as in most cases the contract will be concluded through a messenger and over the internet by downloading the software[65]. According to § 151 BGB though, the receipt of the declaration of acceptance is disposable if the offeror has

---

[63] Cf. Copyright notice at the beginning:
Copyright (C) 1989, 1991 Free Software Foundation, Inc.
51 Franklin Street, Fifth Floor, Boston, MA 02110-1301, USA
Everyone is permitted to copy and distribute verbatim copies
of this license document, but changing it is not allowed.

[64] Jaeger/ Metzger, Open Source Software, p. 148 et seq.

[65] Spindler, Rechtsfragen bei Open Source, p.54. mn. 40

surrendered it[66]. The statement that the GPL is accepted when the software is modified or distribute in §5 GPL obviously declares this surrender.

The language could be considered an additional problem. As the original version of the GPL is exclusively available in English, the declaration of intent could be ineffective. The German Civil Code requires a declaration to be understood by the contracting party otherwise it is not effective.

It has to be assumed though, that if the software is modified or distributed, the content of the GPL has been understood, as without the GPL granting the rights of use these acts are prohibited in Germany [67].

4.3.2 VALIDITY OF §§11, 12 GPL

The required term control is stipulated in §§307ff BGB. They address the validity of pre-formulated contract clauses in consumer contracts. For contracts between entrepreneurs §310 BGB restricts these prerequisites and stipulates the provisions as not directly applicable.
The Federal Court though, sees an indication of an unreasonable discrimination if the prohibited clauses according to §§ 308, 309 BGB are not reasonably to be seen as business dealings. For this reason, pre-formulated contract clauses in contracts between entrepreneurs can also be subject to the term control specified in §§ 308, 309 BGB[68].

§11 GPL "Wavier of warranty" contains a complete disclaimer of any warranty, which means as well for fault-based intentional conduct. Such a waiver also encompasses malice regarding defects of quality and deficiency in title. Accordant to§ 307 I BGB in conjunction with § 307 II Nr1. BGB a contractual term is void if it constitutes an unreasonable discrimination. An unreasonable discrimination exists if it is incompatible with the fundamental idea of the legislation.

---

[66] Jaeger/ Metzger, Open Source Software, p. 32

[67] Jaeger/ Metzger, Open Source Software, p. 150

[68] Jaeger/ Metzger, Open Source Software, p. 150

Pursuant § 276 III BGB a complete waiver of any warranty is prohibited by law and cannot be circumvented by contractual agreement[69]. If the content of a pre-formulated term is subject to a legal prohibition, it certainly constitutes a term incompatible with the fundamental idea of the legislation. It is obvious that § 11 GPL is covered by § 307 I BGB in conjunction with § 307 II Nr1. BGB and therefore void.

At this point I want to remark that the provisions on AGBs are a result of the implementation of EU Directive 93/13/EEC on Unfair Terms in Consumer Contracts and therefore a similar outcome can be expected when applying the law of the nations of the European Union.

The fate of §12 GPL "Waiver of liability" does not leave much to be expected after the precedeing discussion. The content of § 12 GPL leads to the assumption that a complete disclaimer of gross negligence and intent, especially regarding injuries endangering life, body and health, is intended. This is impermissible according § 309 Br. 7 BGB[70]. A waiver of intent is also excluded by § 276 III BGB. For these reasons § 12 GPL is void according § 309 Nr. 7 for contracts including consumers and according to § 307 II Nr. 1 BGB for contracts between entrepreneurs.

The GPL makes an attempt to solve such issues by using terms such as "UNLESS REQUIRED BY APPLICABLE LAW" and "THE EXTENT PERMITTED BY APPLICABLE LAW". These so-called "salvatorische Klauseln" (severability clauses) try to preserve the validity of the clauses in case they are contrary to the applicable law. The content of §§ 11, 12 GPL shall be adapted to the situation given by applicable law. In Germany and according to consumer protection laws this is prohibited. The contracting party has to be certain about the legal position and cannot be encumbered with the assignment to ensure itself about the legality of each of the contract clauses. In line with the leading opinion, severability clauses such as

[69] Cf. 4.2 Freedom of contract

[70] BGH NJW. 1985, p. 3018. Judgement from 32.02.1984; Palandt, Heinrichs §309, mn. 40

the one contained in the GPL do not help to save the enforceability of §§11, 12 GPL[71].

The legal consequences for §§ 11, 12 GPL have to be determined according § 306 II BGB. If the terms are void they have not become part of the contract. For content of such terms the legal provisions have to be applied. In contrast to this is the full compliance with the conditions of the GPL required according to §7 GPL otherwise the distribution of the program is forbidden[72]. Because of §7 GPL, the GPL would not be applicable in Germany. Two reasons speak against this assumption. Firstly, the content of § 7 GPL resembles a severability clause as mentioned above and is invalid for the same reasons.

Additionally the question arises, how it can be possible to distribute an invalid license, which terminates itself if one does not comply with the content. As it has been put quite nicely:

"If someone offers software to be downloaded over the internet and applies AGBs void by law, then he cannot sue the entire world and his brother for software piracy"[73]

If the GPL is distributed in Germany (or any other country), a fact, that has to be assumed when distributing software over the internet, one cannot apply a license which is contrary to the German legal system and expect to be free from all legal consequences.

To sum up, §§11, 12 of the GPL are void, and to determine warranty and liability issues the type contract must be determined. The remaining clauses are still valid, irrespective of §7 GPL.

---

[71] Jaeger/ Metzger, Open Source Software, p. 151

[72] Cf. § 7 GPL

[73] Attempt of a translation of Tomas Hoeren's commentary to the District Court Munich's decision in: CR 2004, p 777

5. TYPES OF CONTRACT

The scope of warranty and liability is, as mentioned many times, highly dependent on the type of contract the transfer of rights is based on. I will concentrate on the download of software from the licensor or a third party without economic intentions, given that the other possible forms of distribution are usually based on economic interests and must be treated completely differently.

Several approaches to classify the gratuitous download of software and the grant of rights are possible and have been suggested by scholars. The implications regarding warranty and liability issues differ with the type of contract.

So far, the validity of the waivers has not yet been tested in court and the suggestions of the literature are the only sources of the possible outcomes in Germany. The differences between those approaches clarify that the outcome of such a case can be far different from what is expected and intended by the GPL. The reasons for the difference in expectations are the different legal system in Germany, stringent regulations of the European Union, and a different understanding of the GPL.

In this chapter, I will present and analyse the possible types of contracts and compare the outcome for the waivers with the intention of the GPL. The second part will analyse the obligatory contract. Subsequently liability and warranty issues will be presented. A summary of the consequences for the GPL will finish this chapter.

5.1 RELINQUISHMENT OF THE COPYRIGHT

One could assume that the author of Free Software wants to avoid a contractual relationship by completely waiving any warranty and liability. The sole possible

way to achieve this would be to relinquish the copyright instead of granting a right of use.

Similar to the dereliction accordant to § 959 BGB, when transferring property to another person, the author could relinquish his intellectual property. Though a minority of German scholars might support this idea, the leading opinion agrees that copyright pursuant to § 29 I UrhG is not transferable and therefore it is impossible to be relinquished.

Firstly, German Copyright Law does not know the dualistic approach of personality and economic rights of an author. Copyright is rather strongly connected to the author's personality and therefore inseparable from his personality. Hence it is impossible to relinquish intellectual property in the way property can be passed to another person according to §959 BGB[74].

Secondly, the GPL assumes the existence of a copyright and uses these instruments to protect its own principles. Obvious signs are the use of the term "license" in § 5 of the GPL which provides an implied consent for the user, and lastly § 6 of the GPL stipulating the relapse of all rights in case of breach of the GPL.

5.2 CONTRACTUS SUI GENERIS

Within the scope of the principle of freedom of contract, it is possible for contracting parties to stipulate any other subject matter of contract, even if not formally regulated by the German Civil Code. Though economically important, especially in patent contracts, the license contract has not yet been regulated by law. It has been developed by case law and legal doctrine for patent contracts granting a right of use. A legal definition is absent, but it is acknowledged that license

[74] Cf. Spindler, Rechtsfragen bei Open Source, Rn. 23; Spindler/Wiebe, Open Source Vertrieb, CR 2003, 873; Metzger/Jaeger, Open Source Software und deutsches Urheberrecht GRUR Int. 1999, 839, 843.

contracts are continuing obligations. The license contract encompasses, as all contracts do, an executory agreement and the disposition of a right of use.

This view differs with regards to software licenses. The obsolete opinion that the contracting parties wish to conclude a contract aiming at the software as intellectual property and not a contract of sale or rent[75], is opposed by case-law, which does not recognize a contract sui generis (and in this case a license contract) for software licenses because this construction gives room for legal uncertainty. It has been argued that a contract sui generis might be necessary for legal transactions which encompass certain business risks or doubts regarding the exploitation of a patent right[76].

In contrast to this are standard software contracts, which do not contain such risks and can be generally subsumed under typical contracts[77]. A contract sui generis would be unnecessary, as the standard contracts are sufficient to encompass the circumstances given when transferring software. The use of a contract sui generis would appear as an attempt to circumvent the legal provisions.

This applies especially to the inclusion of standard business terms, which cannot be used to distinguish contractual terms aberrant from the regulated types of contract, to avoid the legal consequences of such[78].

Another argument against the assumption of a contract sui generis for software is that the use of certain legal expressions does not necessarily lead to the application of related legal norms. Hence, law on sales or tenancy is applicable even if the parties agreed on the term license contract[79].

---

[75] Koch, Urheber- und Kartellrechtliche Aspekte.., p. 335

[76] BGH GRUR 1961, 406 (408), judgement 05.July 1960

[77] BGH NJW 1988, 406, (408 et seq.), judgment 04.11.1987

[78] BGH NJW 1993, 2435, (2437 et seq.), judgment 14.07.1993; BGH CR 1997, 470 (472 et seq.) judgment 04.03.1997

[79] Rolf H. Weber, Freie Software .- Befreiung vom Vertragstypenkonzept?, Festschrift fuer Heinrich Honsell, p.52 [hereinafter Weber/ FS Honsell]

5.3 PARTNERSHIP UNDER CIVIL LAW (GESELLSCHAFT DES BUERGERLICHEN RECHTS)

Developing and improving software is the core of the FSF's philosophy. From the point of view that all participants share this attitude, the community-based activity around a program can be interpreted as a will to contribute to the same goal. Based on this, another approach seeks to classify the GPL as a construction similar to partnership under civil law[80].

Civil law partnerships (GbR) are regulated by §§705 et seq. BGB and are non-commercial enterprises provided that their objects are non-commercial[81]. The characteristic criteria for a GbR are a contractual agreement regarding the partnership purpose and the obligation to advance this purpose.

It is argued that the community of programmers has an interest in receiving additional know-how through the ongoing development, which would constitute a partnership purpose supported by the participating programmers. The interests would obviously be of an economic nature and therefore the whole process has to be deemed as being economically oriented[82]. The altruistic intention of the GPL is apparently secondary.

Additionally, the intention of the programmers and therewith the partnership purpose shall be the development, distribution, and improvement of an operating system. It is true, that every legal purpose is possible as long as a joint purpose is intended[83]. Regarding the obligation to support this purpose, it is submitted that the GPL offers sufficient explicitly stated obligations to contribute to a joint purpose[84].

---

[80] Peter Sester, Open Source Software..., CR. p 801 [hereinafter Sester]; Weber/ FS Honsell p.54

[81] In terms of being outside the scope of the commercial code.

[82] Cf. Especially Weber/ FS Honsell p.54

[83] Palandt/ Sprau, §705 mn. 20 et seq.

[84] Cf. Sester, Open Source Software.., CR. p. 801

This argument fails already at the act of acquisition or running of free software as this is free of any obligations[85]. The GbR is not applicable to the latter as the lack of an obligation can certainly not constitute a duty to contribute to the project and therefore excludes the assumption of a joint purpose. The GbR is primarily concerned with regulating the internal relations of the partners; hence it is imaginable to apply this concept to situations where the software is developed by closed teams[86].

Apart from the other prerequisites that this construction does not comply with[87], it is also problematic to determine the responsible persons for purposes of warranty and liability issues. The number of authors in such projects and the loose connection between those speaks against the assumption of a GbR[88]. §§ 708, 277 BGB stipulate the liability within the GbR, and limit its scope to a duty of care measured at the participants usual care for his own affairs.

For these reasons a construction similar to the GbR is suggested by Sester. The attempt is made to balance warranty and liability according to the type of project by using provisions regulating the GbR and in addition provisions similar to the type of legal transaction (e.g. sale or rent, in the case of a distributor offering additional features to the software)[89].

Weber suggests a combination of GbR and contracts sui generis to offer an adequate and appropriate solution for these new concepts[90].

Schiffner's suggestion refrains from applying the term civil partnership and calls it a collective. He differs between "small authorization" with regards of the simple use,

---

[85] Jaeger/ Metzger, Open Source Software, p. 145

[86] Cf. Malte Gruetzmacher, ITBR 2002, p. 86

[87] For example: partner's meeting, duty to contribute the same share if noting else has been negotiated.

[88] This is even acknowledged by the supporters of this theory: Sester, Open Source Software, CR. p 801; Weber/ FS Honsell, p.54

[89] Cf. Sester, Open Source Software, CR. p. 805

[90] Weber/ FS Honsell, p.58

"extended authorization" in terms of use for usual conventions and "large authorization" which encompasses all rights of use the GPL grants[91]. According to the circumstances it has to be differed between those kinds of authorizations and different contractual types have to be applied[92] For example the "little authorization" shall be covered by an atypical license and the "large authorization" by the rules on GbRs or contracts sui generis.

The positive aspects of these solutions are the attempts to create a fair balance of risks for the participating parties and to react to new phenomena with new concepts. Unfortunately these ideas are based on commercial intentions, which are contrary to the altruistic motives of the GPL. Furthermore, the use and modification of a program are not bound to the obligations § 2b GPL stipulates, as long as the editor refrains from distributing the adaptation. The contractual obligation to advance the partnership purpose is not given in such cases[93].

Eventually, the assumption of a “quasi GbR”, which obviously does not fit, has to be fixed by consulting the provisions of standard contracts in the German Civil Code. This seems inappropriate if one compares it with the arguments against the contract sui generis. The GbR and its alterations would constitute a contract sui generis. If case-law opposes the idea to accept a contract sui generis for software transfers, under what circumstances should it accept this concept? Especially, the outcome of warranty and liability issues is completely unclear until a court has determined which provisions to apply to determine the scope of warranty. For these reasons it is obvious, that the GbR is not an excellent solution.

5.4 DONATION

Apparently the most supported solution in the literature is the donation. Its prerequisites will be presented in detail, to illustrate the reasons that this seems to be

[91] Thomas Schiffner, Open Source Software.., p. 212, 213 [hereinafter Schiffner, OSS]

[92] Schiffner, OSS, p. 238, 239

[93] Spindler, VSI, p. 75

the appropriate solution to be applied. The characteristic feature of a donation is the gratuitous bestowal of a right or a thing.

It is also important to note, that the donation is regulated within contracts; therefore general rules of contracts also apply. As set forth above, the conclusion of a contract is required. For the evaluation of warranty and liability, it is necessary to revert to the rules of general contract law.

The GPL cedes the software and the use of rights free of charge, therefore the assumption of a donation pursuant § 516 I BGB stands to reason. The conditions of the donation according to § 516 I BGB are, besides a gratuitous bestowal (separated for the further discussion into bestowal and free of charge), an enrichment of the beneficiary and the enrichment at the expense of the donator.

5.4.1 BESTOWAL

A bestowal is defined by the transfer of an asset, which is the case for the transfer of a right or good[94]. While the application to a right of use is unproblematic, the question whether software is a good in terms of § 90 BGB is quite complicated. A detailed presentation of this issue is beyond the scope of this thesis. It is necessary to remark though, that software can be copied lossless unlimited times and therefore obviously differs from other chattels. This attribute is an issue for the transfer of property according to § 929 BGB. The transferring person has to relinquish the property completely to transfer it to another. Regarding software this is not necessary and leads to doubts, whether software can be transferred in terms of § 929 BGB.

The German Federal Court (BGH) considers standard software, delivered on a data storage medium, as a good in terms of § 90 BGB[95]. Considering software as an asset, the economic purpose is decisive and therefore a differentiation between

---

[94] Palandt, § 516 BGB, mn. 5

[95] BGH NJW 1993, p. 2436

software on a medium and software downloaded to a harddrive is unjustified, as both lead to the same result: an economic enrichment on the side of the beneficiary. Hence it is unjustified to differ between software by consulting a different technological transfer[96]. At least the analogue application of § 929 BGB was maintained by the BGH. For these reasons software can be the subject matter of a bestowal in terms of § 516 I BGB.

5.4.2 AT THE EXPENSE OF THE DONATOR

An additional condition to the bestowal is the expense of the donator through the bestowal[97]. This is necessary to distinguish a donation from a lending. Without a loss for the donator, the conditions of a lending according to § 598, the permission to use a thing free of charge, might instead be met[98].

Considering the unique feature of software which is to be reproduced without directly recognizable loss, the question whether the transfer of a copy is at the expense of the donator arises again. The logical conclusion of the discussion whether software can be transferred in terms of § 929 BGB is that software is again to be judged from the economic aspect, as an asset, independent from the medium on which it is transferred.

This view is supported by the newly inserted § 453 I BGB stipulating that the sale of rights or "other objects" are to be treated as sale of goods[99]. The same must apply for donations. Eventually to constitute a donation it is decisive for the transfer of the software, that the bestowal is permanent and not temporary.

Regarding the grant of rights of use, the expense of the donator lies in the relinquishment of the incentives offered by copyright. The author irrevocably loses

---

[96] BGH NJW 1990, p. 320

[97] Palandt, § 516, mn. 5

[98] BGH NJW 1982, p. 820

[99] Spindler, VSI, p. 73

the possibility to gain an income by selling the licenses for the software, by applying the GPL to it[100].

5.4.3 ENRICHMENT

The receiving party must also be enriched by the bestowal. As the software and the rights of use are granted, this is undoubtedly the case. owever, one could ask whether the obligation to apply the GPL to the adaptation of the program could exclude the assumption of an enrichment. The receiving party is obviously enriched by receiving the software and the rights to use. Whether the obligations of the GPL have a negative, impact has to be discussed in the following part, which deals with the question whether the bestowal is free of charge or if the obligations constitute a counter-performance.

5.4.4 FREE OF CHARGE

The bestowal is free of charge, if the parties agreed that it is not subject to a counter-performance[101]. Considering the requirement of "Copyleft", which obliges the programmer to apply the GPL to his modification of the former work, the question arises, whether this constitutes a counter-performance[102]. As § 4 GPL leads to the termination of all rights granted by the GPL in case of a breach of its requirements, it can be assumed, that the bestowal is linked to these obligations.

The download and use of software do not demand any obligations from the donee. The conclusion of a contract simply leads to the transfer of the software and rights of use. The obligations of the GPL are connected to the use of the further rights granted, i.e. the distribution and modification of the software. Therefore, the obligations cannot be treated as a direct counter-performance of the bestowal.

---

[100] Jaeger/ Metzger, Open Source Software, p. 141

[101] Palandt, § 516, mn. 8

[102] *Metzger/Jaeger*, GRUR Int. 1999, p. 847

Some argue that the obligations of the GPL could constitute a donation with conditions according to § 525 I BGB[103]. The donator receives a claim against the donee to fulfilment of the condition pursuant § 527 I BGB and is subject to notarisation, § 518 BGB.

The assumption of a donation linked to a condition will regularly fail at the notarisation. Though this can be overcome the moment the donation is in fact executed, i.e. the grant of rights or latest the use of those rights[104], the GPL does not offer an enforceable claim. § 4 GPL explicitly states that the license and the rights granted will be terminated, but does not grant a right to enforce the obligations of the GPL.

For these reasons, the gratuitous download of free software and the transfer of rights granted by the GPL regularly fit to the donation accordant § 516 BGB.

5.5. SUMMARY OF THE TYPES OF CONTRACT

The donation constitutes the appropriate type of contract, as the transfer of rights in the case of downloading software free of charge resembles the donation. It is obvious, that the other suggestions do not lead to adequate results. It has also been presented that the GPL has to be interpreted as pre-formulated contract terms and thus the provisions regarding AGBs are applicable. In compliance with the AGBs, the waivers in §§ 11, 12 GPL are void under the given circumstances and the statutory provisions regarding the law of gifts have to be applied.

---

[103] Koch, Urheber- und kartellrechtlich Aspekte.., CR 2000, p. 35

[104] Spindler, VSI, p. 75

6. WARRANTY AND LIABILITY

So far the we have learned that the freedom of contract in German Civil Law is limited by 276 III BGB, which prohibits a complete waiver of liability for intentional conduct. Moreover, irrespective of the precedent, the waivers under §§ 11, 12 of the GPL are void according to the provisions on AGBs. The rights of use have to be transferred on the basis of a contract, and the contract most likely to be applied seems to be the donation.

As previously mentioned[105], 276 BGB stipulates that a shift of liability can be negotiated by the contracting parties. §276 III BGB limits this possibility by stating that a waiver of intentional conduct is inadmissible. I have left the question whether a mitigation of liability can be assumed to discuss it after determining a type of contract. An additional reason to assume a donation is, besides that the circumstances of the GPL seem to fit best under the donation rubric, the mitigation of liability constituted within the law on gift agreements. In contrast to other types of contracts, the donation limits the scope of liability due to the reason that the donator shall be privileged. In the light of the intention of the waivers of the GPL this is the most appropriate solution possible.

I refrain from discussing non-fault based liability, i.e. product liability, as it regularly requires a commercial interest. This paper concentrates on the use of the GPL without any commercial interest, therefore the discussion whether product liability applies, is out of scope.

In the following part, I will elaborate the scope of warranty and liability in this chapter by first explaining the terms warranty and liability within German context and then assessing the scope of warranty and liability in accordance to the law on gift agreements

---

[105] Cf. 4.2 Freedom of contract

6.1 WARRANTY

Warranty is understood as contractual liability for the substance of a good or right. It encompasses defects in quality of a good and defects in title regarding a right. In terms of the GPL, the download of GPL-licensed software provides the software as a good and the rights of use, therefore we must separate the analysis of a defect of quality regarding the software and a defect in title regarding the rights of use granted.

When applying the statutory provisions of the law on gift agreements §§ 523, 524 BGB have to be consulted. These refer to the provisions on contracts over sale of goods §§ 433 et seq to determine defects of quality or title.

6.1.1 DEFECT OF QUALITY

A defect of quality is determined pursuant § 434 I S. 1. BGB according the "subjektiver Fehlerbegriff", the subjective view of a defect, which defines a defect as follows: "if the good lacks the attributes the two parties agreed on"[106]. This could even be a manual, which has to be delivered with the software to prevent the user from making obvious mistakes[107].

Such kinds of agreements do not regularly exist for FOSS. Hence the defect has to be evaluated by objective criteria in terms of § 434 I S. 2 Nr. 2 BGB. Then, a defect of quality exists if the software is not eligible for the ordinary use and lacks the attributes that such software usually contains. Additionally it is important what the user could expect from software of a similar type[108].

---

[106] Palandt, § 524, mn. 5

[107] Marly, Softwareueberlassungsvertraege, mn. 707

[108] Junker/ Benecke, Computerrecht, mn. 261

It is argued that, regarding software, it is impossible to assume that defects are inevitable[109]. Such an assumption is problematic, as a line has to be drawn to determine a defect of quality.
However, it can be assumed that regarding FOSS, the user cannot expect completely error-free software[110]. FOSS is permanently under development, and it is possible for every programmer to correct mistakes or to upgrade a program. As a joint work is the basis of the philosophy behind the GPL, programmers must be able to modify, develop, and enhance FOSS, and therefore the possible existence of "bugs" has to be obvious. Consequently, one has to assume, that the software itself is never completed in that sense, as can normally be expected from distributed standard software.

Furthermore, the warranty is limited to compensation for damages. The rights granted by warranty which do not require faulty behaviour - such as reduction, contract repudiation, or remedy of defect - are excluded, as the donation is free of charge and therefore the donator privileged. A recourse to those rights would annihilate the donator's privilege and is inadmissible for this reason. In the context of a donation, the scope of warranty is constricted to deceit §§ 523, 524 BGB. Thus, a programmer can be held responsible when he was aware of a defect- "bug" or even viruses or trojans in the software, but fails to point this out[111].

It is argued, that the FOSS philosophy is based on the good will of the programmers and their interest in reputation rather than incentives, so it is unlikely that such behaviour will occur. Nevertheless, the level of relevancy of malice or faulty behaviour will have to be examined in light of the GPL. As the GPL does not oblige one to distribute documentation of the program or documentation of modifications, the lack of such cannot be labelled as a defect[112].

Of course, malice cannot be excluded. In such cases the author or distributor will be held liable for a defect in quality regarding the software provided.

---

[109] Marly, Sofwareueberlassungsvetraege, mn. 714

[110] Schiffner,OSS; p. 258

[111] Schiffner, OSS; p. 258

[112] Junker / Benecke, Computerrecht, mn. 190

6.1.2 DEFECT IN TITLE

Defects in title concern the granted rights of use and the existence of opposing rights. Pursuant to §§523, 435 BGB, the donator will be held responsible if he had positive knowledge of opposing rights of third parties or in case he was not eligible to transfer the right of use[113].
For example, exclusively licensed software cannot be put under the GPL, without entailing a defect in title due to opposing rights of the exclusive licensor. A programmer is also incapable of transferring a right in case he is lacking the authorship.

The scope of positive knowledge has been loosened by case-law, as unfounded or wrong statements regarding those rights can lead to liability, if the stating person could expect the possibility of incorrectness[114].

In terms of GPL-licensed software this means that authors and distributors of free software can be held liable if the circumstances can prove that they had positive knowledge that they lacked the possibility to grant the rights stated in the GPL.

6.2 CONTRACTUAL LIABILITY

The applicability of the law on gifts does not prevent the donator from any liability for fault-based breaches of the contract.

The scope liability could be limited to intentional conduct according to § 276 III BGB in case the contract terms have been individually negotiated. It has been established, that the GPL constitutes pre-formulated terms and therefore § 276 III BGB cannot be applied.

---

[113] Jaeger/ Metzger, Open Source Software; p. 151

[114] Spindler, Rechtsfragen bei Open Source , p. 163

The scope of liability in terms of donations is limited to intention and gross negligence pursuant to § 521 BGB. This corresponds with the minimum level of liability stipulated by law[115].
Negligence is defined in § 276 II BGB and encompasses breaches of protective duties. To constitute gross negligence the breach of a protective duty must be severe, i.e. if the actor ignored something so obvious that everyone else would have recognized it under the same circumstances.

Possible damages could result from breaches of protective duties arising concomitantly with the contract. For example, an obligation to indicate potential dangers arising from the software could constitute such a duty. Unfortunately, in the light of FOSS this kind of obligation is difficult to define, as the inevitability of errors has to be assumed to a certain degree.

I see a potential issue in this. If it is impossible to waive gross negligence the author should know what to expect. It is difficult to define protective duties for Free Software, if the determination of an error is unclear and most important will depend on the courts assessment.

[115] Jaeger/ Metzger, Open Source Software, p. 155

7. IMPLICATIONS

The preceding chapters can be summarized as follows: Despite the opinion of the FSF, the GPL constitutes relations between the contracting parties, which have to be determined by means of contract law. When assessing the scope of liability the type of contract is the decisive factor. It is necessary to assess the scope of liability according to the legal provisions because the waivers in §§ 11, 12 GPL are void pursuant the provisions on AGBs. The donation is the contract most likely to be applied in case of doubt. Regarding the legal consequences, warranty and liability foster this because the donator enjoys a privileged position and the mitigation of liability the law on gift agreements provides.

Although German Civil law comprises the Principle of Freedom of Contract, is this freedom limited by the prohibition of § 276 III BGB and a complete waiver of any warranty and liability inadmissible pursuant German Law. The possibility to negotiate a mitigation of liability is excluded, as it requires individually negotiated terms, a prerequisite that the pre-formulated and unalterable GPL cannot meet.

According to the law of gift agreements, the warranty and liability encompass deceit for defects in quality, positive knowledge for defects of title and gross negligence as lowest scale regarding fault-based contractual liability.

Both, the classification of the GPL as AGBs and a complete disclaimer of liability cannot be circumvented, therefore the above said is the best assessment the application of German Law to the GPL can result in.

Matching this with the intention of the GPL, which disclaims any warranty and liability in §§ 11, 12 GPL, this result is not satisfying. Although it stands to reason that a waiver of malice or intent is inadmissible, especially as the community of programmers will see their reputation destroyed without means to defend

themselves against malice attacks of their philosophy, seems the responsibility for gross negligence inadequate regarding the circumstances.

Liability for protective duties in terms of gross negligence, which are difficult to determine, is both leading to legal uncertainty and an inappropriate reward for an author who surrendered his prospect of an income for the good of the community.

Though in practise, adequate solutions have been developed to protect the author from such responsibility, e.g. by value-adding in the form of granting additional warranties or negotiating individual contract clauses to circumvent customer protection, it cannot be relied on only these, especially as an author must have knowledge of these issues to react appropriately. It seems unjustified that an author shall be held liable for unintended events, if he donated his work to the free software community.

The assessment of gross negligence is difficult. The literature on this topic concludes with liability for intention and gross negligence but does not elaborate the scope of gross negligence regarding FOSS. What can constitute a severe a breach of a protective duty if it cannot be expected that the software is error-free? The situation of FOSS is too specific to draw analogies to case-law. In the absence of case-law only a vague estimation can be made.

The implications for the use of the GPL are obvious, irrespective of the liability for intent and malice, which is already against the intention of the GPL, the scope of gross negligence is a delicate factor authors have to consider.

In particular the application of consumer protection in the context of a donation based on the philosophy of Free Software seems to be inappropriate. Although it is obvious that the GPL constitutes pre-formulated conditions which cannot be negotiated individually except by an additional contract between the parties, it is arguable whether the intentions of consumer protection are compatible with the intentions of the GPL.

As the development of consumer protection is a result of the exploitation of a monopoly by a strong party and leads to unacceptable consequences for the weak

consumer, it has to be wondered whether the inclusion of the GPL displays such an imbalanced situation.

Especially when considering the situation individually negotiated contract terms would create. In this case § 276 III BGB applies and the liability would be limited to intentional conduct. This situation would at least free the author from headaches regarding protective duties that cannot be assessed in advance.

Considering the intention of the GPL to secure the author from such situations the application of German Law regarding the waivers is far from being smooth.

An idea how to deal with the disclaimers can be taken from the Uniform Computer Information Transactions Act (UCITA)[116].

> SECTION 410. NO IMPLIED WARRANTIES FOR FREE SOFTWARE.
>
> (a) **[Free software defined.]** In this section, "free software" means a computer program with respect to which the licensor does not intend to make a profit from the distribution of the copy of the program and does not act generally for commercial gain derived from controlling use of the program or making, modifying, or redistributing copies of the program.
>
> (b) **[Implied warranties inapplicable.]** The warranties under Sections 401 and 403 do not apply to free software.

The UCITA is a model law that has just been implemented in the states of Virginia and Maryland. The FSF is opposing it vehemently and argues that the warranty the UCITA imposes will destroy the concept of Free Software[117]. Considering that the UCITA introduces provisions, which rather remind of German standards, the attitude of the FSF is understandable. However, one aspect is remarkable, Sec. 410 stipulates an exemption for Free Software in a legal surrounding, which limits the

---

[116] UCITA § 410 (2002 Official Text)

[117] http://www.gnu.org/philosophy/ucita.html

possibility to waive the warranty for flaws the software completely. This model article is a good example of an attempt to include Free Software and recognize its special characteristics with regards of non-commercial intentions.

Taking into account the recent developments in the European Union and the decisions based on the EU Lisbon program, a development concerning Free Software has to be expected[118]. The EU parliament expressed the wish to support FOSS as it stands for innovation and therefore correlates with the aim of the Lisbon program to become the most competitive region in the world by 2010[119]. It also aims at setting a sign for the EU Commission, which is enlarging copyright protection for rightholders regularly, to "promote a socially inclusive knowledge-based society[120]"

An additional reason to consider a special treatment and recognition of Free Software is aspects of copyright principles. It is argued, that the German concept of copyright is incompatible with the concept underlying the GPL[121]. Whereas copyright rewards the author with exclusive rights for his creative work, and to secure his income, the GPL in contrast requires him to make his work available without exercising these rights.

Though the common and civil law traditions of copyright differ, both offer an incentive in exchange for the creation of a work. The author contributes to the public and receives the rights to protect his works from misuse and to cover his income[122].

Concerning moral rights, which prevail especially in France and Germany[123] and are directed at the protection of the author's personality, the GPL in fact requires the

---

[118] http://www.heise.de/english/newsticker/news/75560

[119] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20060705+ITEMS+DOC+XML+V0//EN&language=EN#sdocta5

[120] http://www.heise.de/english/newsticker/news/75560

[121] Jaeger/ Metzger, Open Source Software and German Copyright law IIC 2001, p. 52 (57 et seq.)

[122] Schricker, Urheberrecht, Introduction, mn. 19

[123] Jaeger/ Metzger, IIC 2001, p. 52 (57 et seq.)

copyright notice to grant the author the reputation for his contribution to the software.

Additionally, regarding Free Software it has to be argued that an author is not forced to take another work and modify it. Why should he be deprived from his income, if he receives the rights of use free of charge, whilst proprietary software demands royalties and restricts the further examination of the source code completely? The mere obligation of the GPL is to distribute it under the same license again, but this solely concerns the author working on a pre-existing creation. Even though the philosophy of the FSF would prefer to see free software dominate, the GPL does not force anyone to apply it to his own creation.

The GPL is based on US law, some of its copyright principles collide with the continental European approach, and especially with Germany's monistic concept of the work being inseparably connected to the author's personality. For this reason, it is impossible according to German Copyright Law to relinquish the copyright completely. As it has been presented, this is not required by the GPL, on the contrary, the license contract shall always be concluded with the original rightholder[124].

One has to wonder, since when is copyright granted only to give an income? Especially the Continental-European approach and in Germany where the link to the author's personality is important enough to forbid the relinquishment of the copyright, it is surprising that the idea of offering a work to the public without demanding any income should not be protected as much if not even more.

From this point of view, the GPL seems rather contrary to the Anglo-American approach to copyright, which is based on an economic reward for the work of the author and does not recognize moral rights within the concept of copyright[125]. This would lead to the question of whether an author, who surrenders his prospect of an income, should enjoy copyright protection at all. Of course, this cannot be, as the

---

[124] Cf. 3.1.3 and 5.1

[125] But in terms of defamation and similar.

protection for a work is based on the effort spent on a work and not on the author's intention concerning the exploitation of his work. It seems obvious, that the attitude to merely link copyright to an income has gone fairly far. The incentive, which is meant to stimulate authors to contribute to progress and development, shall support his existence and cover investments.

If the right to copyright and exploit a work is granted in exchange for the creation a work to contribute to the public, it seems inappropriate to condemn the intention to contribute to the public without demanding an income. An author, who donates his work to the public and additionally surrenders an income, should rather be privileged.

8. CONCLUSION

I have given an overview of the status in German literature regarding the classification of the GPL and the consequences for the disclaimers of warranty and liability. I have also pointed out that the scope of liability the application of German Law leads to is inappropriate and given ideas and reasons for a special treatment of free software within the system of copyright and contract law.

Contrary to the intention of the GPL and ignoring the charitable aspect of Free Software, the author or authors might be held liable for gross negligence, i.e. duties of care. As it is unsure what such duties could represent, the legal certainty regarding the use of the GPL and Free Software in general is not very comforting.

Such an approach might hamper further development and risk that a court decision will discourage companies or public administrations to use Free Software. It is unacceptable that such a charitable intention is condemned by the legislation to such an extent.

A new version of the GPL, the GPL v. 3 is in the making. Though it attempts to be a "global license"[126], it will have to be seen what the final version will offer and if it achieves to settle these issues.

Additionally, the decision of the European Parliament gives reason for positive expectations regarding the treatment of Free Software in the EU.

---

[126] GPLv3 Process Definition at:
http://gplv3.fsf.org/process-definition#SECTION00310000000000000000, 2006-01-15 12:03

BIBLIOGRAPHY

I LEGAL DOCUMENTS

Buergerliches Gesetzbuch [BGB] (Civil Code), available at:
http://www.gesetze-im-internet.de/englisch_bgb/

Einfuehrungsgesetz zum Buergerlichen Geszetzbuch [EGBGB] (Introductory Act to the Civil Code)

Grundgesetz fuer die Bundesrepublik Deutschland [GG] (Federal Constitution),
http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf

Urheberrechtsgesetz [UrhG] (Copyright Act), available at:
http://www.gesetze-im-internet.de/bundesrecht/urhg/gesamt.pdf

Uniform Computer Information Transactions Act [UCITA], available at:
http://www.law.uh.edu/ucc2b/UCITA_final_02.pdf

II BOOKS

Martina Benecke and Abbo Junker, *COMPUTERRECHT*, 3. Edition, Nomos, Baden-Baden, 2003

Winfried Bullinger and Artur Wandtke (Editors), *PRAXISKOMMENTAR ZUM URHEBERRECHT, MÜNCHEN* , C.H. Beck, 2002

Brian Fitzgerald and Graham Bassett, *LEGAL ISSUES RELATING TO FREE AND OPEN SOURCE SOFTWARE,* Queensland University School of Law, 2003, available at:
http://www.law.qut.edu.au/files/open_source_book.pdf

Nigel Foster and Satish Sule, *GERMAN LEGAL SYSTEM AND LAWS*, 3. Edition, Oxford University Press, 2002

Volker Grassmuck, *FREIE SOFTWARE*, Bundeszentrale fuer politische Bildung, Bonn, 2004

Thomas Hoeren, *RECHTSFRAGEN IM INTERNET*, available at: http://www.uni-muenster.de/Jura.itm/hoeren/material/Skript/skript_Januar2006.pdf

Institut für Rechtsfragen der Freien und Open Source Software [ifrOSS], *DIE GPL KOMMENTIERT UND ERKLAERT*, O'Reilly, 2005

Till Jaeger and Axel Metzger, *OPEN SOURCE SOFTWARE*, München, Beck 2002

Frank Lenhard, *VERTRAGSTYPOLOGIE VON SOFTWAREÜBERLASSUNGSVERTRÄGEN. NEUES URHEBERVERTRAGSRECHT UND NEUES SCHULDRECHT UNTER BERÜCKSICHTIGUNG DER OPEN SOURCE-SOFTWAREÜBERLASSUNG,* Herbert Utz Verlag, München 2006

Jochen Marly, *SOFTWAREÜBERLASSUNGSVERTRÄGE*, 4. Edition., München, C.H.Beck, 2004

Otto Palandt, *BUERGERLICHES GESETZBUCH, KOMMENTAR*, 65. Edition, München , C. H. Beck 2006

Eric S. Raymond, *THE CATHEDRAL & THE BAZAAR*, O'Reilly 2001

Manfred Rehbinder, *URHEBERRECHT*, 13. Edition, München, C. H. Beck, 2004

Andrew St. Laurent, *UNDERSTANDING OPEN SOURCE & FREE SOFTWARE LICENSING*, O'Reilly 2004

Lawrence Rosen, *OPEN SOURCE LICENSING*, Prentice Hall PTR, 2004

Thomas Schiffner, *OPEN SOURCE SOFTWARE – FREIE SOFTWARE IM DEUTSCHEN URHEBER- UND VERTRAGSRECHT, 2003* VVF Verlag (since 2004 Imprint Herbert Utz Verlag),

Gerhard Schricker, *KOMMENTAR ZUM URHEBERRECHT*, 2. Edition, München, C.H.Beck 2006

Gehard Spindler (editor), *RECHTSFRAGEN BEI OPEN SOURCE*, Koeln, Verlag Dr. Otto Schmidt, 2004

Carsten Stoermann, *FREIE SOFTWARE - HAFTUNGS- UND GEWÆHRLEISTUNGSRECHTLICHE FRAGEN UNTER BEACHTUNG URHEBERRECHTLICHER GESICHTSPUNKTE*, available at
http://www.ifross.de/Fremdartikel/DiplomarbeitStoermann.pdf

Mike Widmer, *OPEN SOURCE SOFTWARE – URHEBERRECHTLICHE ASPEKTE FREIER SOFTWARE*, Bern, 2003

Sam Williams, *FREE AS IN FREEDOM: RICHARD STALLMAN AND THE FREE*, O'Reilly 2002

III ARTICLES

Berlecon Research, *FREE/ LIBRE OPEN SOURCE SOFTWARE, SURVEY AND STUDY,*
http://www.berlecon.de/studien/downloads/200207FLOSS_Activities.pdf
accessed 31.08.2006, 17.42

Thies Deike, *OPEN SOURCE SOFTWARE: IPR-FRAGEN UND EINORDNUNG IN DAS DEUTSCHE RECHTSSYSTEM*, Computer und Recht [CR], 2003, p.9 et seq.

Deutscher Bundestag, *PRESS RELEASE*, available at:
http://www.bundestag.de/aktuell/presse/2005/pz_0509023.html,
accessed 31.08.2006, 17.36

European Parliament resolution on implementing the *COMMUNITY LISBON PROGRAMME*, available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20060705+ITEMS+DOC+XML+V0//EN&language=EN#sdocta5
accessed 31.08.2006, 17.40

Free Software Foundation, *SELLING FREE SOFTWARE,* available at
http://www.gnu.org/philosophy/selling.html

Free Software Foundation, *THE FREE SOFTWARE DEFINITION,* available at
http://www.gnu.org/philosophy/free-sw.html

Free Software Foundation, *WHAT IS COYLEFT?*, available at
http://www.gnu.org/licenses/licenses.html#WhatIsCopyleft

Free Software Foundation, *WHY WE MUST FIGHT UCITA*, available at:
http://www.gnu.org/philosophy/ucita.html, accessed 31.08.2006, 17.50

golem.de, Interview: *DIE FREIHEIT DER GPL HAT IHRE GRENZEN*, available at:
http://www.golem.de/0406/31852.html, accessed 31.08.2006, 17.42

Robert W. Gomulkiewicz, *DE-BUGGING OPEN SOURCE SOFTWARE LICENSING*, 64 Pitt.L.Rev. 75, 2002

Robert W. Gomulkiewicz, *HOW COPYLEFT USES LICENSE RIGHTS TO SUCCEED IN THE OPEN SOURCE SOFTWARE*, 36 Hous. L. Rev. 179, 1999

Groklaw, *TIMELINE OF EVENTS RE. IBM VS. SCO*, available at:
http://www.groklaw.net/staticpages/index.php?page=20031016162215566,
accessed 31.08.2006, 17.42

Malte Gruetzmacher, *OPEN-SOURCE-SOFTWARE - DIE GNU GENERAL PUBLIC LICENSE*, Der IT-Rechtsberater [ITRB], 2002, p. 84 et seq.

Lucie Guibault, *UNRAVELLING THE MYTH AROUND OPEN SOURCE LICENCES: AN ANALYSIS FROM A DUTCH AND EUROPEAN LAW PERSPECTIVE*, Information technology & law series 8, The Hague 2006

Heise online, *EU PARLIAMENT CALLS FOR BETTER SUPPORT OF OPEN SOURCE*, available at: http://www.heise.de/english/newsticker/news/75560, accessed 31.08.2006, 18.58

Thomas Hoeren, *OPEN SOURCE UND DAS SCHENKUNGSRECHT*, Recht und Risiko, 2004, p. 229 et seq.

Thomas Hoeren, *COMMENT IN: LG MUENCHEN I: WIRKSAMKEIT EINER GPL LIZENZ*, Computer und Recht [CR] 2004, p. 774 et seq.

Bernd Hugenholtz and Lucie Guibault, *STUDY ON THE CONDITIONS APPLICABLE TO CONTRACTS RELATING TO INTELLECTUAL PROPERTY IN THE EUROPEAN UNION,* available at: http://www.ivir.nl/publications/other/final-report2002.pdf

Till Jaeger and Axel Metzger, *GUTACHTEN ZU AUSGEWAEHLTEN RECHTLICHEN ASPEKTEN DER OPEN SOURCE SOFTWARE,* available at http://opensource.c-lab.de/files/portaldownload/Rechtsgutachten-NOW.pdf

Till Jaeger and Axel Metzger*, OPEN SOURCE SOFTWARE UND DEUTSCHES. URHEBERRECHT*, Gewerblicher Rechtschutz und Urheberrecht Internationaler Teil [GRUR Int.], 1999, p 839 et seq.

Till Jaeger and Axel Metzger, *OPEN CONTENT-LIZENZEN NACH DEUTSCHEM RECHT*, Multimedia und Recht [MMR], 2003, p. 431 et seq.

Till Jaeger and Axel Metzger, *OPEN SOURCE SOFTWARE AND GERMAN COPYRIGHT LAW*, *IIC Vol 32,* available at http://rsw.beck.de/bib/default.asp?vpath=%2Fbibdata%2Fzeits%2FIIC%2F2001%2Fcont%2FIIC%2E2001%2E52%2E1%2Ehtm&ha=Y-300-Z-IIC-B-2001-S-52-N-1

Eben Moglen, Free *SOFTWARE MATTERS: ENFORCING THE GPL,I*, available at

http://emoglen.law.columbia.edu/publications/lu-12.html

Frank A. Koch, *URHEBER- UND KARTELLRECHTLICHE APEKTE DER NUTZUNG VON OPEN SOURCE SOFTWARE*, Computer und Recht [CR] 2005, pp. 279 et seq / 333 et seq.

Mathias Lejeune, *RECHTSPROBLEME BEI DER LIZENSIERUNG VON OPEN SOURCE SOFTWARE*, IT-Rechtsberater 2003, p. 10

Maastricht Economic and social Research and training centre on Innovation and Technology, *FREE/ LIBRE OPEN SOURCE SOFTWARE: POLICY SUPPORT,*
available at: www.flosspols.org, accessed 31.08.2006 , 17.34

Axel Metzger, *COMMENT IN: LG MUENCHEN I: WIRKSAMKEIT EINER GPL LIZENZ*, Computer und Recht [CR] 2004, p. 774 et seq.

Herrmann-Josef Omsels, *OPEN SOURCE SOFTWARE UND DEUTSCHES VERTRAGS- UND URHEBERRECHT*, Festschrift für Paul W. Hertin, München 2000, p. 141

Open Source Initiateve, *OSI CERTIFICATION MARK AND PROGRAM*, available at
http://www.opensource.org/docs/certification_mark.php

Open Source Initiateve, *HISTORY OF THE OSI*, available at
http://www.opensource.org/docs/history.html

Andreas Rahmatian, *NON-ASSIGNABILITY OF AUTHORS' RIGHTS IN AUSTRIA AND GERMANY AND ITS RELATION TO THE CONCEPT OF CREATIVITY IN CIVIL LAW JURISDICTIONS GENERALLY: A COMPARISON WITH U.K. COPYRIGHT LAW*, Entertainment Law Review 2000, p. 95 et seq.

Eric S. Raymond, *GOODBYE FREE SOFTWARE; HELLO OPEN SOURCE*, available at
http://www.catb.org/~esr/open-source.html

searchopensource.techtarget.com, *UNIX*, available at
http://searchopensource.techtarget.com/sDefinition/0,,sid39_gci213253,00.html
accessed 31.08.2006, 17.42

searchopensource.techtarget.com, *KERNEL*, available at http://searchopensource.techtarget.com/sDefinition/0,290660,sid39_gci212439,00.html, accessed 31.08.2006, 17.42

searchopensource.techtarget.com, *LINUS TORVALD*, available at http://searchopensource.techtarget.com/sDefinition/0,290660,sid39_gci878891,00.html, accessed 31.08.2006, 17.42

Peter Sester, *OPEN-SOURCE-SOFTWARE: VERTRAGSRECHT, HAFTUNGSRISIKEN UND IPR-FRAGEN,* Computer und Recht [CR] 2000, pp. 797 et seq.

Gerhard Spindler, *RECHTSFRAGEN DER OPENS SOURCE SOFTWARE,* available at http://www.vsi.de/inhalte/aktuell/studie_final_safe.pdf

Gerhard Spindler, *OPEN SOURCE: LEGAL PROBLEMS IN GERMANY*, www.opensourcelaw.info

Gerhard Spindler and Andreas Wiebe, *OPEN SOURCE VERTRIEB*, Computer und Recht [CR] 2003, p. 873 et seq.

Richard Stallman, *INITIAL ANNOUNCEMENT,* available at http://www.gnu.org/gnu/initial-announcement.html

Richard Stallman, *THE GNU MANIFESTO,* available at http://www.gnu.org/gnu/manifesto.html

Bartosz Sujecki, *VERTRAGS- UND URHEBERRECHTLICHE ASPEKTE VON OPEN SOURCE SOFTWARE IM DEUTSCHEN RECHT*, JurPC Web-Dok. 145/2005

Rolf H Weber, *FREIE SOFTWARE - BEFREIUNG VOM VERTRAGSTYPENKONZEPT? BESONDERES VERTRAGSRECHT - AKTUELLE PROBLEME,* Festschrift für Heinrich Honsell zum 60. Geburtstag , 2002 , pp. 41 – 59

whatis.techtarget.com, *OBJECT CODE,* available at: http://whatis.techtarget.com/definition/0,,sid9_gci539287,00.html

accessed 31.08.2006, 17.42

Andreas Wiebe, *VALIDITY OF OPEN SOURCE LICENCES*, Computer und Recht [Cri] 2004, p. 156 et seq.

Andreas Wiebe, *OPEN SOURCE-VERTRIEB, COMPUTER UND RECHT*, [CR] 2003, p. 873 et seq.

VI DECISIONS

Federal Court of Justice, BGH NJW. 1985, p. 3018. Judgement from 32.02.1984

Federal Court of Justice, BGH GRUR 1961, 406 (408), judgement 05.July 1960

Federal Court of Justice, BGH NJW 1988, 406, (408 et seq.), judgment 04.11.1987

Federal Court of Justice, BGH NJW 1993, 2435, (2437 et seq.), judgment 14.07.1993;

Federal Court of Justice, BGH NJW 1990, 320, judgment 18.10.1989

Federal Court of Justice, BGH NJW 1982, 820, judgment

Landgericht München I [LG] (trial court), 19.5.2004 - Az: 21 O 6123/04, available at: http://www.jbb.de/urteil_lg_muenchen_gpl.pdf, accessed 31.08.2006, 17.45

inofficial translation available at: http://www.jbb.de/judgment_dc_munich_gpl.pdf, accessed 31.08.2006, 17.42

ANNEX

GPL[127]

GNU General Public License Table of Contents

GNU GENERAL PUBLIC LICENSE

Version 2, June 1991

Preamble

The licenses for most software are designed to take away your freedom to share and change it. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change free software--to make sure the software is free for all its users. This General Public License applies to most of the Free Software Foundation's software and to any other program whose authors commit to using it. (Some other Free Software Foundation software is covered by the GNU Lesser General Public License instead.) You can apply it to your programs, too.

[127] available at: http://www.fsf.org/licenses/gpl.html#SEC4

When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things.

To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to certain responsibilities for you if you distribute copies of the software, or if you modify it.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.

We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software.

Also, for each author's protection and ours, we want to make certain that everyone understands that there is no warranty for this free software. If the software is modified by someone else and passed on, we want its recipients to know that what they have is not the original, so that any problems introduced by others will not reflect on the original authors' reputations.

Finally, any free program is threatened constantly by software patents. We wish to avoid the danger that redistributors of a free program will individually obtain patent licenses, in effect making the program proprietary. To prevent this, we have made it clear that any patent must be licensed for everyone's free use or not licensed at all.

The precise terms and conditions for copying, distribution and modification follow.

TERMS AND CONDITIONS FOR COPYING, DISTRIBUTION AND MODIFICATION

0. This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License. The "Program", below, refers to any such program or work, and a "work based on the Program" means either the Program or any derivative work under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language. (Hereinafter, translation is included without limitation in the term "modification".) Each licensee is addressed as "you".

Activities other than copying, distribution and modification are not covered by this License; they are outside its scope. The act of running the Program is not restricted, and the output from the Program is covered only if its contents constitute a work based on the Program (independent of having been made by running the Program). Whether that is true depends on what the Program does.

1. You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright

notice and disclaimer of warranty; keep intact all the notices that refer to this License and to the absence of any warranty; and give any other recipients of the Program a copy of this License along with the Program.

You may charge a fee for the physical act of transferring a copy, and you may at your option offer warranty protection in exchange for a fee.

2. You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided that you also meet all of these conditions:

a) You must cause the modified files to carry prominent notices stating that you changed the files and the date of any change.
b) You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.
c) If the modified program normally reads commands interactively when run, you must cause it, when started running for such interactive use in the most ordinary way, to print or display an announcement including an appropriate copyright notice and a notice that there is no warranty (or else, saying that you provide a warranty) and that users may redistribute the program under these conditions, and telling the user how to view a copy of this License. (Exception: if the Program itself is interactive but does not normally print such an announcement, your work based on the Program is not required to print an announcement.)

These requirements apply to the modified work as a whole. If identifiable sections of that work are not derived from the Program, and can be reasonably considered independent and separate works in themselves, then this License, and its terms, do not apply to those sections when you distribute them as separate works. But when you distribute the same sections as part of a whole which is a work based on the Program, the distribution of the whole must be on the terms of this License, whose permissions for other licensees extend to the entire whole, and thus to each and every part regardless of who wrote it.

Thus, it is not the intent of this section to claim rights or contest your rights to work written entirely by you; rather, the intent is to exercise the right to control the distribution of derivative or collective works based on the Program.

In addition, mere aggregation of another work not based on the Program with the Program (or with a work based on the Program) on a volume of a storage or distribution medium does not bring the other work under the scope of this License.

3. You may copy and distribute the Program (or a work based on it, under Section 2) in object code or executable form under the terms of Sections 1 and 2 above provided that you also do one of the following:

a) Accompany it with the complete corresponding machine-readable source code, which must be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange; or,

b) Accompany it with a written offer, valid for at least three years, to give any third party, for a charge no more than your cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code, to be distributed under the terms of Sections 1 and 2 above on a medium customarily used for software interchange; or,
c) Accompany it with the information you received as to the offer to distribute corresponding source code. (This alternative is allowed only for noncommercial distribution and only if you received the program in object code or executable form with such an offer, in accord with Subsection b above.)

The source code for a work means the preferred form of the work for making modifications to it. For an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable. However, as a special exception, the source code distributed need not include anything that is normally distributed (in either source or binary form) with the major components (compiler, kernel, and so on) of the operating system on which the executable runs, unless that component itself accompanies the executable.

If distribution of executable or object code is made by offering access to copy from a designated place, then offering equivalent access to copy the source code from the same place counts as distribution of the source code, even though third parties are not compelled to copy the source along with the object code.

4. You may not copy, modify, sublicense, or distribute the Program except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or distribute the Program is void, and will automatically terminate your rights under this License. However, parties who have received copies, or rights, from you under this License will not have their licenses terminated so long as such parties remain in full compliance.

5. You are not required to accept this License, since you have not signed it. However, nothing else grants you permission to modify or distribute the Program or its derivative works. These actions are prohibited by law if you do not accept this License. Therefore, by modifying or distributing the Program (or any work based on the Program), you indicate your acceptance of this License to do so, and all its terms and conditions for copying, distributing or modifying the Program or works based on it.

6. Each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor to copy, distribute or modify the Program subject to these terms and conditions. You may not impose any further restrictions on the recipients' exercise of the rights granted herein. You are not responsible for enforcing compliance by third parties to this License.

7. If, as a consequence of a court judgment or allegation of patent infringement or for any other reason (not limited to patent issues), conditions are imposed on you (whether by court order, agreement or otherwise) that contradict the conditions of this License, they do not excuse you from the conditions of this License. If you cannot distribute so as to satisfy simultaneously your obligations under this License and any other pertinent obligations, then as a consequence you may not distribute the Program at all. For example, if a patent license would not permit royalty-free redistribution of the Program by all those who receive copies directly or indirectly through you, then the only way you could satisfy both it and this License would be to refrain entirely from distribution of the Program.

If any portion of this section is held invalid or unenforceable under any particular circumstance, the balance of the section is intended to apply and the section as a whole is intended to apply in other circumstances.

It is not the purpose of this section to induce you to infringe any patents or other property right claims or to contest validity of any such claims; this section has the sole purpose of protecting the integrity of the free software distribution system, which is implemented by public license practices. Many people have made generous contributions to the wide range of software distributed through that system in reliance on consistent application of that system; it is up to the author/donor to decide if he or she is willing to distribute software through any other system and a licensee cannot impose that choice.

This section is intended to make thoroughly clear what is believed to be a consequence of the rest of this License.

8. If the distribution and/or use of the Program is restricted in certain countries either by patents or by copyrighted interfaces, the original copyright holder who places the Program under this License may add an explicit geographical distribution limitation excluding those countries, so that distribution is permitted only in or among countries not thus excluded. In such case, this License incorporates the limitation as if written in the body of this License.

9. The Free Software Foundation may publish revised and/or new versions of the General Public License from time to time. Such new versions will be similar in spirit to the present version, but may differ in detail to address new problems or concerns.

Each version is given a distinguishing version number. If the Program specifies a version number of this License which applies to it and "any later version", you have the option of following the terms and conditions either of that version or of any later version published by the Free Software Foundation. If the Program does not specify a version number of this License, you may choose any version ever published by the Free Software Foundation.

10. If you wish to incorporate parts of the Program into other free programs whose distribution conditions are different, write to the author to ask for permission. For software which is copyrighted by the Free Software Foundation, write to the Free Software Foundation; we sometimes make exceptions for this. Our decision will be guided by the two goals of preserving the free status of all derivatives of our free software and of promoting the sharing and reuse of software generally.

NO WARRANTY

11. BECAUSE THE PROGRAM IS LICENSED FREE OF CHARGE, THERE IS NO WARRANTY FOR THE PROGRAM, TO THE EXTENT PERMITTED BY APPLICABLE LAW. EXCEPT WHEN OTHERWISE STATED IN WRITING THE COPYRIGHT HOLDERS AND/OR OTHER PARTIES PROVIDE THE PROGRAM "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE PROGRAM IS WITH YOU. SHOULD THE PROGRAM PROVE DEFECTIVE, YOU ASSUME THE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION.

12. IN NO EVENT UNLESS REQUIRED BY APPLICABLE LAW OR AGREED TO IN WRITING WILL ANY COPYRIGHT HOLDER, OR ANY OTHER PARTY WHO MAY MODIFY AND/OR REDISTRIBUTE THE PROGRAM AS PERMITTED ABOVE, BE LIABLE TO YOU FOR DAMAGES, INCLUDING ANY GENERAL, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE USE OR INABILITY TO USE THE PROGRAM (INCLUDING BUT NOT LIMITED TO LOSS OF DATA OR DATA BEING RENDERED INACCURATE OR LOSSES SUSTAINED BY YOU OR THIRD PARTIES OR A FAILURE OF THE PROGRAM TO OPERATE WITH ANY OTHER PROGRAMS), EVEN IF SUCH HOLDER OR OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

END OF TERMS AND CONDITIONS

How to Apply These Terms to Your New Programs

If you develop a new program, and you want it to be of the greatest possible use to the public, the best way to achieve this is to make it free software which everyone can redistribute and change under these terms.

To do so, attach the following notices to the program. It is safest to attach them to the start of each source file to most effectively convey the exclusion of warranty; and each file should have at least the "copyright" line and a pointer to where the full notice is found.

```
one line to give the program's name and an idea of what it does.
Copyright (C) yyyy  name of author

This program is free software; you can redistribute it and/or
modify it under the terms of the GNU General Public License
as published by the Free Software Foundation; either version 2
of the License, or (at your option) any later version.

This program is distributed in the hope that it will be useful,
but WITHOUT ANY WARRANTY; without even the implied warranty of
MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE.  See the
GNU General Public License for more details.

You should have received a copy of the GNU General Public License
along with this program; if not, write to the Free Software
Foundation, Inc., 51 Franklin Street, Fifth Floor, Boston, MA  02110-1301,
USA.
```

Also add information on how to contact you by electronic and paper mail.

If the program is interactive, make it output a short notice like this when it starts in an interactive mode:

```
Gnomovision version 69, Copyright (C) year name of author
Gnomovision comes with ABSOLUTELY NO WARRANTY; for details
type `show w'.  This is free software, and you are welcome
```

```
to redistribute it under certain conditions; type `show c'
for details.
```

The hypothetical commands `show w' and `show c' should show the appropriate parts of the General Public License. Of course, the commands you use may be called something other than `show w' and `show c'; they could even be mouse-clicks or menu items--whatever suits your program.

You should also get your employer (if you work as a programmer) or your school, if any, to sign a "copyright disclaimer" for the program, if necessary. Here is a sample; alter the names:

```
Yoyodyne, Inc., hereby disclaims all copyright
interest in the program `Gnomovision'
(which makes passes at compilers) written
by James Hacker.

signature of Ty Coon, 1 April 1989
Ty Coon, President of Vice
```

This General Public License does not permit incorporating your program into proprietary programs. If your program is a subroutine library, you may consider it more useful to permit linking proprietary applications with the library. If this is what you want to do, use the GNU Lesser General Public License instead of this License.